

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION**

THURMAN KIRKWOOD

PLAINTIFF

v.

CAUSE NO. 1:16CV119-LG-RHW

MARSHALL FISHER, ET AL.

DEFENDANTS

**ORDER ADOPTING REPORT AND RECOMMENDATION,
AND GRANTING MOTION FOR SUMMARY JUDGMENT**

This cause comes before the Court on the Proposed Findings of Fact and Recommendation [62] of United States Magistrate Judge Robert H. Walker entered in this cause on July 31, 2017. Plaintiff Kirkwood filed this lawsuit pursuant to 42 U.S.C. § 1983 complaining of events that allegedly occurred while he was confined in the South Mississippi Correctional Institution. He alleges 1) failure to protect from assault; 2) destruction of legal paperwork; and 3) retaliation in the form of falsified Rule Violation Reports (“RVRs”). The defendants filed a motion for summary judgment asserting that Kirkwood had failed to exhaust the first two claims, and the third claim was barred by the statute of limitations in part and lacking factual support in part. Kirkwood then filed documents which the Magistrate Judge construed as a response. After reviewing the submissions of the parties and the relevant law, Magistrate Judge Walker recommended that the defendants’ summary judgment motion be granted and the plaintiff’s claims dismissed.

THE LEGAL STANDARD

Kirkwood filed an objection to the Magistrate Judge’s findings and conclusions. The Court must review any objected-to portions de novo. *See*

Kreimerman v. Casa Veerkamp, S.A. de C.V., 22 F.3d 634, 646 (5th Cir. 1994); *Longmire v. Guste*, 921 F.2d 620, 623 (5th Cir. 1991). Such a review means that the Court will consider the record which has been developed before the Magistrate Judge and make its own determination on the basis of that record. *United States v. Raddatz*, 447 U.S. 667, 675 (1980). The Court need not, however, conduct a de novo review when the objections are frivolous, conclusive, or general in nature. *Battle v. U. S. Parole Comm’n*, 834 F.2d 419, 421 (5th Cir. 1987). No factual objection is raised when a petitioner merely re-urges arguments contained in the original petition. *Edmond v. Collins*, 8 F.3d 290, 293 (5th Cir. 1993).

DISCUSSION

Kirkwood’s objection goes to his first two claims. He states that his rights were violated, and that he “did exhaust said matters by and through the prison grievance system” but that “his grievance of the matter was destroyed by the defendants” and “the filing of the grievance was the root of the retaliation.” (Pl. Obj. 1, ECF No. 64). It is unclear which grievance Kirkwood refers to, but there was uncontradicted evidence that Kirkwood had not filed grievances concerning the matters the Magistrate Judge found to be unexhausted. (Cooley Aff. 1, ECF No. 52-1). Kirkwood’s objection is without merit because it is contradicted by the record. The Magistrate Judge was correct to conclude that Kirkwood had failed to show a question of material fact regarding whether he had exhausted his administrative remedies.

Having reviewed the remainder of the Proposed Findings of Fact and

Recommendation, the Court finds it neither clearly erroneous nor contrary to law. The Magistrate Judge properly concluded that the summary judgment motion should be granted and this case dismissed. The Proposed Findings of Fact and Recommendation will be adopted as the findings and conclusions of this Court.

IT IS THEREFORE ORDERED AND ADJUDGED that the Proposed Findings of Fact and Recommendation [62] of United States Magistrate Judge Robert H. Walker entered in this cause on July 31, 2017, should be, and the same hereby is, adopted as the findings of this Court.

IT IS FURTHER ORDERED AND ADJUDGED that the defendants' Motion [52] for Summary Judgment is **GRANTED**. Plaintiff's claims of failure to protect and destruction of legal paperwork are **DISMISSED without prejudice** for failure to exhaust. Plaintiff's claim of retaliation is **DISMISSED with prejudice**.

SO ORDERED AND ADJUDGED this the 31st day of August, 2017.

s\ *Louis Guirola, Jr.*

Louis Guirola, Jr.
Chief U.S. District Judge